85-427 (1)

Case Number

Supreme Court, U.S.
FILED
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

JACK P. McGEE,
Plaintiff-Petitioner

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BRUNSWICK,
Defendent-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Herbert P. Schlanger
Suite 900
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 588-1981

William H. Glover, Jr.
Post Office Box 132
Brunswick, Georgia 31521
(912) 264-0620

Attorneys for Petitioner

33 pp

ISSUES PRESENTED

1. Does the Bank Tying Act prohibit a bank from requiring that a customer pay the bank's subsidiary an appraisal fee before the bank will even accept a loan application?

2. Does this Court's holding in *Copperweld Corp v. Independence Tube Corp.*, 81 L.Ed.2d 628 (1984) (that the Congress did not intend for the antitrust laws to apply to an agreement between a parent corporation and its wholly-owned subsidiary) apply in a situation where the Congress has required that the parent corporation keep its subsidiary separate?

3. As a matter of law, is a real estate appraisal not a product separate from a loan secured by real estate?

TABLE OF CONTENTS

Issues presented 1

Table of Contents 2

Table of Authorities 3

Opinions below 4

Jurisdictional statement 4

Statutes involved 5

Statement of the case 6

Reasons for granting the writ 9

The Bank Tying Act aspects 10

Capacity to conspire 11

Two products, not one 13

Conclusion 16

Appendix 17

TABLE OF AUTHORITIES

Continental T.V. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 15-16

Copperweld Corp. v. Independence Tube Corp.
81 L.Ed.2d 628 (1984) 1, 9, 11-13

Jefferson Parrish Hospital District No. 2 v. Hyde,
104 S.Ct. 1551 . . . . . 10, 13-15

National Society of Professional Engineers v. U.S.,
435 U.S. 679 (1978) 15

Swerdloff v. Miami Nat. Bank,
584 F.2d 54 (5th Cir. 1978) 10-11

12 U.S.C. §1972 . . . . . 5, 10-11, 13

15 U.S.C. §1 . . . . . 5, 11, 13

28 U.S.C. §1254 4

1970 U.S. Code Cong. and Adm. News,
p. 5519, 5535 11

OPINIONS BELOW

The district court's opinion was not reported; a copy of it is included in the appendix to this petition. The Court of Appeals' opinion is reported at _____ F.2d _____ and is also reproduced in the appendix.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 28, 1985. This Court has jurisdiction over this petition by virtue of the provisions of 28 U.S.C. §1254.

STATUTES INVOLVED

Bank Tying Act, 12 U.S.C. §1972:

(1) A bank shall not in any manner extend credit . . . or furnish any service . . . on the condition or requirement –

(A) that the customer shall obtain some additional . . . service from such bank; [or]

. . .

(C) that the customer provide some additional . . . property to such bank other than those related to and usually provided in connection with a loan

. . . .

Sherman Antitrust Act, 15 U.S.C. §1:

Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . .

STATEMENT OF THE CASE

Jack P. McGee was, from 1975 until 1979, employed by First Shelter Corporation as a real estate appraiser, R.158. First Shelter is a wholly-owned subsidiary service corporation of First Federal Savings and Loan Association of Brunswick, R.297. It was created by First Federal to provide non-banking services normally associated with the making of real estate loans which it could not, because of the restrictions in the banking laws, provide to its customers itself.

In 1979, Mr. McGee left First Shelter and established his own real estate appraisal business, independent of any bank or savings and loan association, and entered into competition with (among others) First Shelter, R.297. While he was an employee at First Shelter he was, of course, on First Federal's list of "approved" appraisers. A few months after he left First Shelter, his name was removed from the list and First Federal refused to accept appraisals done by him, R.297. There is no question in this litigation concerning Mr. McGee's qualifications — even Mr. Slade, the president of First Federal, agrees that he is qualified, R.183.

First Federal's list of "approved" appraisers is compiled by First Shelter, and First Federal will utilize the appraisal services only of those persons on the list, R.186. As Mr. Slade testified:

> Q: Who does the evaluation for First Federal of the appraisers to determine whether they're qualified to be an approved appraiser?
>
> A: The manager of First Shelter and the loan department head [of First Federal] and his staff.
>
> Q: And the board of directors [of First Federal]?

A: Ultimately, they ratify.

Q: But they follow the recommendations of those people?

A: Yes.

(Deposition of Mr. Ben T. Slade, III, pp. 60-61, R.186-87)

When a potential borrower seeks to apply to First Federal for a loan, he must first pay to have an appraisal of his property done, R. 180 and 297. Only after he does this will first Federal consider his application. Routinely, and without disclosing the relationship between First Federal and Shelter, First Federal "steers" the customer to First Shelter for the appraisal, R. 180 and 297. Only under unusual circumstances will the services of a non-First Shelter appraiser be used, R.181.

First Federal has commissioned approximately 40% of the appraisals in the Glynn County, Georgia, area to First Shelter, R.159, 297; other banks and savings and loans have similar exclusionary arrangements with their service corporations, R.298. Although there is a significant demand for real estate appraisal services separate from the real estate loan market, R.159-60, it is clear that an exclusion from the real estate market makes the operation of an appraisal business impossible.

So it was with Mr. McGee and, as a result, he was put out of business. He filed suit, asserting that the agreement between First Federal and First Shelter violated the antitrust laws and the Bank Tying Act. The district court granted First Federal summary judgment, holding that First Shelter and First

Federal were incapable of conspiring in violation of the antitrust laws, that there was no "tie", because the bank was the "consumer" of the appraisal, and that the real estate appraisal was not a product separate from a real estate loan. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

To insure, among other things, the integrity of the loan values placed on their portfolios by banks and savings and loan associations, Congress has prohibited the financial institutions from performing real estate appraisals. It has also passed the Bank Tying Act, to insure that banks cannot require borrowers to use the bank or its subsidiaries for non-banking services.

The effect of the Court of Appeals' holding in this case — that a bank *can* require a loan applicant to secure an appraisal from the bank's subsidiary — flies in the face of these plainly stated Congressional policies.

A construction by this Court of the Act is necessary because the holding below has so far strained the Act's language that it renders ineffective the Congress' attempt to deal with the problems it perceived.

Second, petitioner believes that when this Court decided the *Copperweld* case, it did not intend to foreclose the possibility of finding antitrust liability in an agreement between commonly controlled corporations in a situation (such as is presented in this case) where Congress has mandated that they be kept separate. The holding was simply a statement that there was no indication of Congressional intent to reach that result in unregulated areas of the economy. It is desirable for the Court to restate and clarify its holding in *Copperweld*, since there are many business situations in which the legislature has commanded a separation of functions among related corporations.

The third issue presented for review concerns the analysis courts must undertake in determining whether there is only one product or two in a situa-

tion where a tying arrangement is alleged. It is important since the Court of Appeals has either misread or misapplied the criteria set down by this Court in *Jefferson Parrish Hospital District No. 2 v. Hyde,* 104 S.Ct. 1551, and its erroneous application of law needs to be corrected.

1. *The Bank Tying Act.*

Insofar as the allegations concerning the Bank Tying Act are concerned, the lower courts held that the bank was the "consumer" of the appraisal service and, therefore, the appraisal and the loan were one product from the consumer's point of view. That conclusion was erroneous.

The argument was advanced by First Federal (and was accepted by the lower courts) that First Federal was the entity commissioning the appraisal and, as such, it could not be violating paragraph (A) of the Act. That argument makes sense only if form is to prevail over substance.

The purpose of the law was to prevent anti-competitive banking practices; such arrangements as First Federal has forged should not be condoned simply because they are creatively structured. Cf. *Swerdloff v. Miami Nat. Bank,* 584 F.2d 54, 58 (5th Cir. 1978). The customer is required to pay for an additional service (the appraisal) from the bank (via its subsidiary) if the bank is to consider his application ("furnish a service") or make him a loan ("extend credit"). This should be construed to be violation of paragraph 1(A) of the Act.

Considering paragraph 1(C), there is no question that the borrower is required to pay the bank for the appraisal (i.e., "provide some additional . . . property to such bank"). The Act prohibits this unless it is "usually provided in connection with a loan."

In order to prevail under paragraph (C) (even under its own theory of the law) First Federal should have,

at least, been required to demonstrate that its practice of requiring an appraisal *from a subsidiary corporation* is a uniform practice in the industry.

This is so because there appear to be two possible interpretations of the language contained in paragraph (C) of the Act; the difference between them is subtle but vital. The first, urged by First Federal, is that if a service is usually provided in connection with a loan then the bank may charge for it, whether or not such a service was usually provided by the bank.

The other interpretation, which makes more sense, is that the Act permits the bank to charge the customer for a service only if it is *usually provided by the bank* in connection with a loan.

The first interpretation would eviscerate the Act and should be rejected; the second interpretation is consistent with the legislative history and purpose of the Act. See 1970 U.S. Code Cong. and Adm.News, p. 5519, 5535; *Swerdloff v. Miami Nat. Bank,* 584 F2d. 54, 59 (5th Cir. 1978). This second interpretation of the language should be adopted and applied. If this is done, a violation of the Act appears. This Court should grant certiorari to correct the erroneous holding of the Court of Appeals.

2. *Capacity to conspire*

As noted, this case concerns an agreement between a bank and its wholly-owned subsidiary service corporation (First Shelter Corporation) to exclude from the business of doing real estate appraisals certain qualified appraisers who compete or could compete with First Shelter. Jack McGee is such an appraiser, McGee affidavit, ¶4, R. 159; Slade deposition, pp. 23-24; 60-61, R.182-183; 186-87.

As Mr. Slade's deposition testimony (quoted above) shows, there is no question but that there is an agreement between First Federal and First

Shelter concerning which appraisers the bank will "approve" for use. It clearly is an agreement in restraint of trade. The only question for the Court to resolve is whether First Federal and First Shelter are capable of conspiring in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. §1.

The district court and the Court of Appeals held that, as a matter of law, First Federal and its subsidiary, First Shelter, could not have entered into any agreement violative of the antitrust laws. This holding was premised on this Court's decision in *Copperweld Corp. vs. Independence Tube Corp.*, 81 L.Ed.2d 628 (1984).

Basically, the *Copperweld* opinion held that Congress did not intend for the "contract, combination...or conspiracy" language of section 1 of the Sherman Act, 15 U.S.C. §1, to apply to agreements between a parent company and its wholly-owned subsidiary. The heart and rationale of the *Copperweld* decision was that to permit any other interpretation would elevate form over substance and restrict unduly business conduct. The decision was grounded on the logical point that a parent company could, if it wished, exercise total dominion over its subsidiary by simply merging the antitrust problems which occur when more than one entity is involved.

The rationale of *Copperweld* does not apply, however, in the circumstances presented in this case. Here we have a clearly articulated Congressional policy requiring that banks refrain from exercising direct control in connection with certain related (but non-banking) business activities. Under current law, First Federal could *not* have merged First Shelter into itself. In the banking industry, the Congress — and not the businessmen involved — has made the decision that these businesses must

be kept apart and operated as separate entities. Thus, while it may make sense not to penalize with antitrust concerns those free-market businessmen who choose to operate certain aspects of their businesses through a subsidiary, it makes no sense to do so when it is the Congress which has commanded that the businesses be kept separate.

For the Court of Appeals to expand the *Copperweld* rationale and hold that such related entities are not subject to the antitrust laws when they enter into an agreement which restrains trade is to fly in the face of the policy expressed by the Congress when it passed the Bank Tying Act in order to strengthen the antitrust laws with respect to just such an extension of exclusionary or restrictive practices by banks into non-banking areas.

This Court does not appear to have considered or envisioned the extension of its decision from the unregulated, free enterprise marketplace into those regulated areas where the Congress has expressed its opinion as to the proper corporate relationships and conduct. The Court of Appeals went too far, and certiorari should be granted to correct the lower court's holding.

3. *The tying arrangement*

The lower courts held that no claim under the Bank Tying Act or under the Sherman Act for an illegal tie-in was shown since there is only one product involved (not two). The lower courts were wrong.

It is clear that First Federal was requiring the prospective borrower to purchase from First Shelter a service before he could have his loan application processed by First Federal, Slade deposition, p.21, 1.13-18, R. 180.

The fact that an appraisal is a service different from and not just incidental to a loan is evidenced in

at least two ways. First, the appraisal and the loan involve two independent transactions, separately priced and purchased from the perspective of the buyer. That is, the borrower must first pay for the appraisal and then First Federal processes his application; if the loan is approved, First Federal then charges him the other loan closing costs.

Second, there exists a sufficent demand for appraisal services separate from loan services (i.e., tax appeals, estate appraisals, emminent domain proceedings, etc.) to identify it as a product market distinct from the product market for real estate loans, McGee affidavit, ¶¶8 and 9, R.159-60.

The controlling precedent is this Court's decision in *Jefferson Parrish Hospital District No. 2 v. Hyde,* 104 S.Ct. 1551, in which the analysis of tie-ins and exclusive dealing was re-examined and re-stated. *Hyde* involved a factual situation quite analogous to the one presented in the present case.

In *Hyde,* the hospital had entered into an agreement with a group of anesthesiologists which provided that the group's members would be the only anesthesiologists permitted to provide services in the hospital. Another anesthesiologist sued, claiming that the contract violated the antitrust laws both as a tie-in and as an exclusive dealing arrangement which restricted competition.

In the present case, a borrower cannot get First Federal even to *process* a loan application unless he pays First Shelter to do an appraisal (just as a patient could not get the hospital to accept him as surgical patient unless he agreed to use one of the designated anesthesiologists). The bank has an agreement with First Shelter that only First Shelter will do its appraisals (just as the hospital had an agreement with the anesthesiologist group that it could perform all anesthesiology services).

This Court held that the arrangement challenged in *Hyde was* a tie but that, on the record in the case, the restriction was not shown to be *per se* violative of the antitrust laws.* Under the analysis used in *Hyde,* the arrangement presented in this case is subject to antitrust attack.

* This finding necessitated a further step in the antitrust analysis: an evaluation under the "rule of reason". On the facts in that *trial* record, the Court held that no showing had been made by the plaintiff to sustain his burden under the "rule of reason". (This was not surprising since the case had been tried on a *per se* theory.)

It should be noted that, if anything, Mr. McGee's case is stronger than that in *Hyde.* There, this Court emphasized the fact that the record showed that any patient of the hospital who was unhappy with the prospect of using one of the anesthesiologists chosen by the hospital could always go to some other hospital in the area and use an anesthesiologist chosen by the patient.

In contrast, the facts in this case show that a borrower does *not* have any other place to go if he wants to use an appraiser of his choice. The practice of excluding qualified appraisers conforms to the *uniform* practice in the industry (defendant's memorandum, R.96; McGee affidavit, ¶6, R.159). To the extent that most or all of the banks and savings and loan associations in the area have entered into exclusive dealing arrangements (or exclusionary, though not necessarily exclusive, arrangements), the borrower is a captive of the choice of the particular institution and competition in the business of appraisals has been significantly limited.

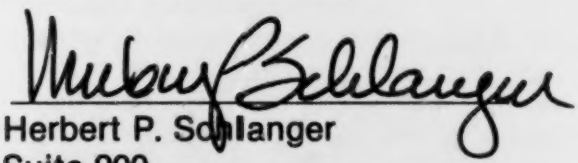
Further, even if the restrictive arrangements are not condemned *per se* (that is, if the bank does not have the market power to force acceptance of the tie), the restraint must still be analyzed under the "rule of reason". The *sine qua non* of the rule of reason analysis is that there be a showing that the procompetitive benefits of the restraint outweigh the anticompetitive harms, if the practice is to pass muster under the antitrust laws. See, e.g., *National Society of Professional Engineers v. U.S.,* 435 U.S. 679 (1978); *Continental T.V. v. GTE*

(footnote cont'd)

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



Herbert P. Schlanger
Suite 900
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 588-1981

- and -

William H. Glover, Jr.
Post Office Box 132
Brunswick, Georgia 31521
(912) 264-0620

(footnote cont'd)

Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977). First Federal has advanced no evidence or argument which even remotely suggests that there are any pro-competitive benefits which flow from this anti-competitive and exclusionary agreement it has with First Shelter. The agreement not only should *not* have been vindicated on summary judgment, but rather it should have been summarily struck down.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

JACK P. McGEE, CIVIL ACTION

Plaintiff

V.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BRUNSWICK

Defendant No. 283-213

ORDER

Plaintiff, alleging that defendant bank's real property loan appraisal procedure constitutes an illegal tying arrangement; brings civil claims pursuant to 15 U.S.C. §1 (conspiracy in restraint of trade), 15 U.S.C. §2 (attempted monopolization), 12 U.S.C. §1972 (commercial bank anti-tying act), and 18 U.S.C. §962 (RICO). Having considered defendant's motion for a summary judgment or alternatively for dismissal, the Court shall order judgment for defendant on all counts.

FACTUAL BACKGROUND

Defendant, First Federal Savings and Loan Association ("First Federal"), a Brunswick, Georgia, bank, does a large regional business in real property loans. When transacting a real property loan, First Federal is required by federal regulations to commission an appraisal of the property to be taken as security. The procedure which First Federal uses to

commission his appraisal is the point of contention in the case at bar.

Defendant's loan procedure begins with the customer's application. When the application is submitted, First Federal collects an appraisal fee, which the bank retains regardless of whether the loan closes. In an overwhelmingly majority of cases, First Federal refers the appraisal to its wholly-owned appraisal subsidiary, First Shelter. Alternately, First Federal maintains a list of outside appraisers whose appraisals it will accept. However, the bank does nothing to inform customers of this option. Plaintiff asserts that this procedure has given First Shelter a 40% share of the local real property appraisal market.

Plaintiff was employed by First Shelter as an appraiser from 1975-1979. During his tenure there, plaintiff criticized First Federal's practice of steering appraisals to its subsidiary. In-house appraisals, plaintiff continues to contend, lack independence, as they can be adjusted to serve the bank's purposes. In deposition, plaintiff recalled four specific instances in which he had been pressured to make appraisals fit loans, and he indicated that this occurred on other occasions as well. In 1979, McGee was fired from First Federal, in part for having publicly voiced his disaffection with First Federal's appraisal procedure.

After leaving First Shelter, plaintiff began an independent appraisal business, serving the Brunswick area. First Federal kept him on their appraiser list until 1980, when his name was removed. Plaintiff's business enjoyed no great success, and by 1981, when plaintiff performed only eight appraisals, it had slowed to a trickle.

Plaintiff asserts that defendant's activity with regard to commissioning appraisals has illegally ex-

cluded him, as an independent appraiser, from the real property appraisal market. Plaintiff alleges that defendant has conspired to sabotage his business, by having removed his name from its approved list, and by having refused to refer to him customers who inquired about appraisals he had done while at First Shelter. The crux of plaintiff's complaint, however, is that defendant has generally stifled the flow of business to independent appraisers by requiring its loan customers to use the services of First Shelter. The anticompetitive effect of this practice, plaintiff explains, is enhanced because other banks in the geographic market also engage in exclusionary appraisal practices. Plaintiff concludes that by "tying" appraisal service to its loans, defendant has violated federal anti-trust laws, codified at 15 U.S.C. §§1 and 2, and at 12 U.S.C. §1972 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.§1961 *et seq.*

DISCUSSION

Claim Under 15 U.S.C.§1 that Defendant's Appraisal Procedure is a Combination in Restraint of Trade

Plaintiff contends that First Federal has agreed and conspired with "other entities" to exclude him from the business of performing real property appraisals in its geographic market. The complaint asserts that defendant's co-conspirators include, but are not limited to, defendant's subsidiary, First Shelter.

Plaintiff has failed to allege with specifically entities with which First Federal conspired other than First Shelter. Moreover, the parties' briefs focus solely on the §1 ramifications of a conspiracy between First Federal and First Shelter. Plaintiff has alleged no alternative §1 co-conspirator in the event that no conspiracy is found to exist between First

Federal and its subsidiary.

To the extent that plaintiff alleges a §1 combination between First Federal and First Shelter, his claim is governed by *Copperweld Corp. v. Independence Tube Corp.*, 81 L.Ed.2d 628 (1984). *Copperweld's* clear holding squarely applies: §1's requirement of concerted activity is not satisfied by allegations of coordinated activity between a parent and its wholly-owned subsidiary, *Copperweld*, 81 L.Ed.2d at 647.

Plaintiff contends that the regulatory context which necessitated First Federal's corporate relationship with First Shelter distinguishes the case at bar from *Copperweld*. While the parent-subsidiary relationship in *Copperweld* was merely a convenient alternative to departmentalization, defendant asserts that First Federal is statutorily prohibited from integrating First Shelter. Defendant created its appraisal subsidiary for the purpose of avoiding this statutory proscription. Plaintiff argues that the bar against integration in the current case provides an element of separateness not present between the would-be conspirators in *Copperweld*.

This argument has logical force and finds some support in the *Copperweld* opinion. *See, e.g.*, 81L.Ed.2d at 644 (pointing out that a corporate parent can assert its will over its subsidiary by threat of integration). The *Copperweld* holding, however, simply admits of no exceptions. Regardless of the purpose served by the parent-subsidiary relationship, a parent and its subsidiary are incapable of engaging in §1 concerted activity.

Accordingly, plaintiff's claim that defendant conspired with its subsidiary to restrain trade in violation of 15 U.S.C. §1 will be dismissed.

Claim under 15 U.S.C. §2 that Defendant's Appraisal Procedure Constitutes a Monopolistic Tying Arrangement

In addition to his §1 claim, plaintiff alleges that defendant's loan procedure constitutes an attempt to monopolize the market for residential and commercial real property appraisals, in violation of 15 U.S.C. §2. To survive defendant's motion for summary judgment, plaintiff must demonstrate that genuine issues of fact exist as to each element of the *prima facie* of attempted monopolization. This three-pronged *prima facie* case requires plaintiff to show: (1) defendant's employment of anticompetitive practices which would, if successful, accomplish monopolization; (2) a dangerous probability that monopolization will indeed result from these practices; and, (3) specific intent of defendant to monopolize the relevant market. *Quality Foods de Centro America v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 996 (11th Cir. 1983) plaintiff's conclusory allegation that defendant attempted to monopolize is simply insufficient to survice a motion for summary judgment. *See id* at §95; Amended Complaint at §8. Having reviewed the materials before it on defendant's motion for summary judgment, the Court concludes that plaintiff has failed to make out a *prima facie* case of attempted monopolization. As the Court finds as a matter of law that plaintiff has demonstrated no anticompetitive practices by defendant, the Court will forego discussion of prongs two and three of the *prima facie* case.

Plaintiff satisfactorily pleads anticompetitive practices by defendant by the allegation that defendant has illegally tied acquisition of a loan from First Federal to purchase of an appraisal from First

Shelter. A tying arrangement, if instituted with the requisite intent, can ground a §2 claim.[1] As a threshold requirement to a tying claim, plaintiff must show that two distinct products are involved; a tying product, in the market for which defendant has economic power, and a tied product, which defendant forces on consumers wishing to purchase the tied product. *Jefferson Parish Hospital District No. 2 v Hyde,* 80 L.Ed.2d 2, 21 (1984). Plaintiff's tying case fails because he has not shown that defendant's loan customers purchase the loan and appraisal as separate, tied products.

The Supreme Court's recent opinion in *Jefferson Parish Hospital District No. 2 v. Hyde* provides the current benchmark analysis for determining product duality in tying cases. Defendant Jefferson Parish Hospital had granted an anesthesiologist service group exclusive rights to perform anesthesiological services for the hospital's surgical patients. Plaintiff alleged that this agreement illegally tied patient access to surgical services to use of the anesthesiological group's services. The hospital responded that one product only was involved, a functionally integrated package of services and that, thus, no tie existed.

[1] *See generally California Computer Products v. International Business Machines,* F.2d 727, 735-737 (9th Cir. 1979)(discussing the similarity between the conduct required to ground complaints under §§1 and 2, and concluding that both sections prohibit conduct unreasonably restrictive of competition.

Because tying violations are generally attacked under the rubric of §1 as conspiracies in retraint of trade, few cases focus on the application of §2 to tie-ins. For the purpose of §2 analysis, this Court assumes that a tying arrangement which cannot be attacked as a §1 violation under *Copperweld* can nonetheless ground a §2 claim.

In finding that surgical and anesthesiological services were separate products, the Court reasoned that product duality turns not on the functional relation between the products, but on the character of consumers' demand for them. 80 L.Ed.2d at 17. The key is whether the market for the two products are distinguishable in the eyes of consumers. The Court was persuaded that Hyde involved two products by the district court's finding that surgical patients frequently requested the services of particular anesthesiologists, rather than settling for the hospital's selection.

In arguing that the loan and appraisal constitute two products in the case at bar, plaintiff highlights the *Hyde* Court's statement that the allegedly tied products must fall into two distinct product markets. Plaintiff asserts that consumers recognize as distinct the market for real property loans and the market for appraisals. However, this argument misses the point. To determine product duality, the Court needs to consider the character of consumer demand for the specific products at issue. Thus, this Court must determine whether there exists legitimate consumer demand to purchase loan-related appraisal services separate from purchase of the loan itself.

To this point, defendant urges that the bank, not the borrower, "consumes" the appraisal product and that, thus, the bank may select whomever it likes to perform the appraisal. Indeed, federal regulations requires *the lending institution* to commission a competent appraisal of real property it intends to take as security. *See* 12 C.F.R. §545.32(b)(1) (1984). Regulation further permits the bank to pass the appraisal cost on to the loan customer. *See* 12 C.F.R. §3500.7.

Plaintiff accurately points out that these regula-

tions do not require the bank to usurp complete control over selection of an appraiser. Indeed, by maintaining a list of approved outside appraisers, First Federal does allow loan applicants a hand in appraiser selection. However, defendant asserts, it is the bank which is asked to lend against the security of the property; thus, it is the bank which has the paramount interest in assuring the accuracy of the appraisal.

For support in its argument, defendant looks to a line of cases typified by *Foster v. Maryland State Savings and Loan,* 590 2d 928 (D.C. Cir. 1978), *cert. denied* , 439 U.S. 1071 (1979). Plaintiff in *Foster* alleged that an illegal tie resulted when defendant lending bank used its law firm to prepare closing documents and charged the attorney fee to the borrower. The *Foster* court, finding that the closing services did nor constitute a tied product, stated:

> The loan review services performed by the selected law firm were provided to and paid for the Defendant (bank) as an additional means of insuring the security of its loans. The attorney fee collected by the Defendant to pay for these services was not demonstrably excessive, and did not enable the Defendant to secure a profit...Defendant was authorized (by law) to charge its borrower for these legal expenses. Under these circumstances, plaintiff's payment of the attorney fee charge to the Defendant lender represented an incidental and inseparable part of the "purchase" of the loans, rather than the purchase of a tied product.

590 F.2d at 931; *Accord Sibley v. Federal Land Bank of New Orleans.*
597 F2d. 459 (5th Cir. 1979), *cert. denied,* 444 U.S. 941 (1980).

This Court finds the *Foster* reasoning persuasive. The Court has further concluded that *Jefferson Parish Hospital v. Hyde* does not command an outcome in this case inconsistent with *Foster.* The *Hyde* Court reasoned that product duality results if there is consumer demand to select and purchase the allegedly tied products separately. Such was the quality of consumer demand in *Hyde* because both surgical and anesthesiological services were provided for the patient-consumer's benefit. Health care consumers legitimately demand the opportunity to select these two patient services separately.

By contrast, separate consumer demand is unwarranted as to the loan and appraisal in the current case. While the loan is provided as a service to the borrower, the appraisal is commissioned by the bank for the bank's protection. The bank, rather than the borrower, "consumes" the appraisal product. The cost of the appraisal is merely passed along to the borrower, as all costs which a merchant incurs in doing business are passed along to his customers.

In the case at bar, plaintiff has failed to demonstrate that the pre-loan appraisal is provided to the borrower as a product separate from the loan itself. Rather, it is clear that the appraisal is purchased by and for the benefit of the lending bank. As a tying violation exists only where the consumer is forced to purchase a separate product, defendant's loan appraisal procedure cannot be characterized as a tie.

As plaintiff's allegation of a tying arrangement fails, so does his *prima facie*§2 case. To satisfy the first prong of the *prima facie* case, plaintiff must demonstrate that defendant has employed some anticompetitive practice. It is clear to the Court that defendant has not committed a tying violation. Plaintiff has alleged no other anticompetitive act sufficient to ground a §2 claim; therefore, defendant's motion for

summary judgment as to plaintiff's claim under 15 U.S.C. §2 will be granted.

Claim under 12 U.S.C. §1972 that Defendant's Loan Procedure Illegally Ties Separate Banking Services

In addition to the §2 tying claim, plaintiff contends that defendant's alleged tying arrangement violates 12 U.S.C.§1972. This statute states in pertinent part:

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement –

(A) that the customer shall obtain some additional credit, property, or service, from such bank other than a loan, discount, deposit, or trust service;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit or trust service.

12 U.S.C. §1972 (1976).

The purpose and effect of §1972 is to apply the Sherman Antitrust Act's general prohibition against anticompetitive tying arrangements to the field of commercial banking. *Parsons Steel, Inc. v. Alabama Bank of Montgomery,* 679 F.2d 242, 245 (11th Cir. 1982). As §2 of the Sherman Act requires, the §1972 plaintiff must show that defendant tied two distinct banking products.

The previous discussion disposing of plaintiff's §2 tying claim as well disposes of the §1972 tying claim. The pre-loan appraisal is a product commissioned by and for the benefit of the lending bank. By collecting an appraisal fee from its borrower, First Federal does not sell the appraisal as a tied product to the borrower, but merely recoups an expense it incurred in transacting the loan. As plaintiff has failed to sustain his claim that defendant tied First Shelter's appraisal services to acquisition of a loan, defendant's motion for summary

judgment on plaintiff's claim under 12 U.S.C.§1972 will be granted.

Claim Under 18 U.S.C §1962 that Defendant has Used an Enterprise for Racketeering Purposes

Section 1962 of Title 18 U.S.C., popularly referred to as RICO, prohibits use of any enterprise to carry on a pattern of racketeering activity. Racketeering activity, defined in 18 U.S.C. §1961, includes mail fraud, as prohibited in 18 U.S.C. §1341. *See* 18 U.S.C. §1961 (1) (Supp. 1982).

Plaintiff alleges that defendant's violation of 18 U.S.C. §1341 provides the requisite predicate racketeering activity to ground a civil RICO action. Amended Complaint §9. In pleading the alleged mail fraud, plaintiff tracks the statutory language of 18 U.S.C. §1341 with the claim that defendant utilized the United States mails in furtherance of a scheme to obtain money by means of false and fraudulent pretense. Plaintiff has demonstrated factual basis to support his conclusory allegation of a "fraudulent scheme." Accordingly, the RICO claim will be dismissed, for plaintiff's failure to have adequately demonstrated defendant's involvement in a racketeering activity.

CONCLUSION

Plaintiff's claims pursuant to 15 U.S.C. §1 and 18 U.S.C. §1962 are DISMISSED for plaintiff's failure to have stated claims against defendant upon which relief can be granted.

Defendant's motion for summary judgment is GRANTED as to plaintiff's claims pursuant to 15 U.S.C. §2 and 12 U.S.C. §1972.

The Clerk of Court is directed to enter judgement on behalf of defendant consistent with the foregoing.

SO ORDERED, this 5th day of November, 1984.

CHIEF JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

McGEE v. FIRST FEDERAL SAV. & LOAN ASS'N

Jack P. McGee, Plaintiff-Appellant,

v.

FIRST FEDERAL SAVINGS and LOAN ASSOCIATION OF BRUNSWICK.
Defendant-Appellee

No. 84-8923
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

May 28, 1985.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Plaintiff, Jack P. McGee, a real estate appraiser in Brunswick, Georgia, appeals the dismissal of his antitrust claim that defendant, First Federal Savings & Loan Association of Brunswick, violated antitrust laws by setting up an arrangement whereby First Federal would refer the appraisal required for real estate loans to a wholly owned subsidiary. Alleging the procedure constituted an illegal tying arrangement, plaintiff claimed conspiracy in retraint of trade (15 U.S.C.A. §1), an attempted monopolization (15 U.S.C.A. §2), an illegal tying agreement (12 U.S.C.A. §1972), and a RICO violation (18 U.S.C.A. §1962). For the reasons set out in the district court's opinion, we affirm.

[1] Aside from the facts, two legal principles were central to the grant of summary judgment. First, in light of *Copperweld Corp. v. Independence Tube Corp.*, — U.S.—, 104 S.Ct. 2731, 18 L.Ed.2d 628 (1984), a parent corporation and its subsidiary are incapable of engaging in the concerted activity required for a violation of section 1 of the Sherman Act, even though a separate corporation is required for independent appraisal purposes.

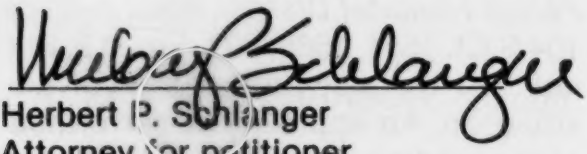
[2,3] Second, to support a claim of an illegal tying arrangement, the law requires a showing of two distinct products: a tying product, in the market for which defendant has economic power, and a tied product, which defendant forces on consumers wishing to purchase the tying product. *Jefferson Parish Hospital District No. 2 v. Hyde,* — U.S. —, —, 104 S.Ct. 1551, 1565, 80 L.Ed.2d 2, 21 (1984). there are not two distinct products involved in the alleged situation. An appraisal is performed for the benefit of the lending institution. It is the "consumer" of the appraisal product. There is no legitimate consumer demand by a borrower to purchase loan-related appraisal services separate from the purchase of the loan itself. Federal regulation requires *the lending institution* to commission the appraisal. *See* 12 C.F.R. §545.32(b)(1) (1984). The appraisal's cost is simply passed on to the borrower as a business cost. *See* 24 C.F.R. §3500.7. Plaintiff failed to demonstrate that the pre-loan appraisal is provided to the borrower as a product separate from the loan itself.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 23rd day of August, 1985, served three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI on counsel for respondent by depositing it in an envelope in the U.S. Mail with sufficient postage affixed thereto to assure delivery to:

John E. Bumgartner
Dickey, Whelchel, Brown & Readdick
Suite 301 First Federal Plaza
P.O. Box 220
Brunswick, Georgia 31521-0220



Herbert P. Schlanger
Attorney for petitioner